Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 248.

KINGMAN & COMPANY,
Plaintiff in Error.
vs.
THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

Brief for Plaintiff in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

JAMES H. McINTOSH,
Attorney for Plaintiff in Error.

STATEMENT OF THE CASE.

Brief Statement of the Issue.

May it please the Court:

This cause comes into this court on a writ of *certiorari*, directed to the United Circuit Court of Appeals for the Eighth Circuit, to review the judgment of that court, dismissing the plaintiff in error's writ of error for want of jurisdiction.

The question involved herein is, whether the

time for suing out a writ of error to the United States Circuit Court of Appeals, pursuant to the 11th Section of the Act of March 3rd, 1891, for the establishment of Circuit Courts of Appeals, for the review of a judgment in an action at law in those districts where it is customary to enter judgment at once upon the return of the verdict, and to entertain and rule upon motions for new trials when they are filed within three days after the entry of the judgment, commences to run from the date of the entry of the judgment, or from the date of the overruling the motion for a new trial. The Circuit Court of Appeals for the Eighth Circuit held in this case that the time for suing out the writ of error commences to run from the date of the entry of the judgment, and not from the date of the order overruling the motion for a new trial which was seasonably filed and entertained by the court, and therefore they dismissed this cause for want of jurisdiction. If it is true that the time for suing out the writ of error commences to run in such case from the date of the judgment, and not from the date of the overruling of the motion for a new trial, then the order of the Circuit Court of Appeals for the Eighth Circuit dismissing this writ of error was correct. If, however, the time for suing out the writ of error commences to run from the date of the overruling of the motion for a new trial which was seasonably filed and entertained by the court, then the judgment of the Circuit Court of Appeals in dismissing this writ of error was erroneous.

The Manner in Which This Question Arises.

The defendant in error, The Western Manufacturing Company, a resident and citizen of the State and District of Nebraska, duly prosecuted a suit against the plaintiff in error, Kingman & Company, a resident and citizen of the State, and Northern Disrict, of Illinois, in the Circuit Court of the United States for the District of Nebraska; and such proceedings were had therein that said cause duly came on for trial before a jury at the May, 1895, term of said court, resulting in a verdict on the 4th day of June, 1895, of said term, against the plaintiff in error, for the sum of $1996.66. On the coming in of said verdict the court, according to its established custom in jury trials, at once rendered judgment on said verdict. Record, page 24. Page 25.

Within three days after the recording of said verdict and judgment, and on the 6th day of June, 1895, it being still the May term of said court, the plaintiff in error filed its motion in said cause to vacate and set aside said judgment, and for a new trial, for the several reasons in said motion stated. Page 25.

Said motion for a new trial was entertained by the court, was duly presented on its merits by counsel for the respective parties, and thereupon, at the November, 1895 term, of said court, and on the 11th day of December, 1895, was overruled, pursuant to the following order that day entered:

"THE WESTERN MANUFACTURING COMPANY,
vs.
'KINGMAN & COMPANY. } 226 Q.

"This cause having been heard on the motion

"of the defendant to set aside the judgment and "the verdict, and for a new trial herein, was argued "and submitted to the court by the attorneys for "the respective parties; whereupon, after careful "consideration thereof, and being fully advised in "the premises, it is now on this day considered, "ordered and adjudged by the court that said mo- "tion be, and the same is hereby, overruled, and "that the judgment heretofore entered herein be "and remain absolute."

On the next day after the order overruling the motion for a new trial, an order was duly entered, giving the plaintiff in error thirty days from that date, December 12th, in which to prepare and present its bill of exceptions.

The bill of exceptions was duly served on the attorneys for the defendant in error, and was by them "December 30th, 1895, returned without amendment," was presented to the trial judge for his signature January 9th, 1896, and was by said judge duly allowed, and was filed January 11th, 1896.

The plaintiff in error's petition for writ of error and assignment of error were filed, the bond approved, and the writ of error duly allowed, all on January 20th, 1896.

The citation was duly issued, served, returned and filed January 22nd, 1896. The record was filed in the Court of Appeals March 14, 1896, and was duly printed.

Thereafter, and on the 1st day of May, 1896, the defendant in error filed its motion in the Cir-

cuit Court of Appeals, which, omitting the caption was as follows:

"Comes now the defendant, the Western Man-"facturing Company, and moves the court for an "order dismissing this appeal for the following "reasons:

"1st. Because the court has no jurisdiction of "the said cause.

"2nd. Because more than six months inter-"vened between the date of the rendition of the "judgment in said action and the date of allowing "and taking out the writ of error in said cause.

"3rd. Because more than six months inter-"vened between the date of the rendition of judg-"ment in said cause, and the filing of any assign-"ment of error in said cause in the circuit court.

" 4th. Because more than six months inter-"vened between the date of the entery of judgment "in said cause and the filing of the petition for writ "of error in said cause in the circuit court.

"5. Because more than six months intervened "between the date of the entry of the judgment in "said cause and the time of filing the supersedeas "bond in said cause.

"6th Because more than six months inter-"vened between the time of the entry of judgment "in said cause and the showing of citation therein.

"WALTER J. LAMB,
"*Attorney for the Western Mfg. Co.,*
"*Defendant in Error.*" Page 113.

Said cause duly came on to be heard on the fore-going motion. The motion was sustained May 21st,

1896, and the writ of error was dismissed with costs,
114. for want of jurisdiction. A petition for a rehearing of said motion was duly filed, but a rehearing was denied by an order entered September 21st, 1896, and upon motion of counsel for plaintiff in error an order was duly entered staying mandate
123. until the first Monday in November, 1896. Pursuant to the prayer of the petition of the plaintiff in error your Honors caused a writ of *certiorari* to issue herein, under date of the 28th of October, 1896, removing said cause into this court.

ERRORS RELIED UPON.

It was error to have dismissed this writ of error out of the Circuit Court of Appeals for want of jurisdiction, for the motion for new trial was seasonably and properly filed and the judgment in said cause did not become final until the motion for a new trial was disposed of. The writ of error was taken and sued out within six months after the entry of the order overruling the motion for a new trial, as required by the 11th Section of the act creating Circuit Courts of Appeals, and therefore the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court.

BRIEF OF THE ARGUMENT.

No written opinion of the Circuit Court of Appeals was filed in passing upon the defendant in error's motion to dismiss. Arguments, however, in support of the following points, received favorable consideration, to wit: That there is no such thing known to the Federal practice as a motion

for a new trial; that the Federal Statute, Section 987, provides a method of procedure in applying for a new trial in an action at law, and that that procedure is exclusive; that in view of said Section 987 the only method by which a new trial can be obtained is, not by motion, but by petition, which can only be filed with leave; that the application for a new trial in this case having been by motion, filed without leave of court, and not by petition filed with leave of court as the statute requires, was ineffectual for any purpose; and that therefore the judgment was final on the date of its entry, which was more than six months before the writ of error herein was taken or sued out.

First Point.

The filing of a motion for a new trial, as was done in this case, was proper procedure.

(*a*) In the judiciary act of 1789, it was provided that "all of said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

Revised Statutes of United States Sec. 726.

At the time this statute was passed, the remedy by motion for a new trial was and long had been a well recognized common law remedy. The motion was made as a matter of right without leave or limitation, except that it "must be made within the first four days of the next succeeding term, within which term it is usually heard and decided."

III Cooley Blackstone, 3rd Ed. 391.

(*b*) The practice and mode of procedure existing at the time of this transaction in like cases in

the courts of record in the state of Nebraska were regulated by the following statute:

"The application for a new trial must be made "at the term when the verdict, report or decision "is rendered, and except for the cause of newly "discovered evidence, material for the party ap- "plying, which he could not with reasonable dili- "gence have discovered and produced at the trial, "shall be within three days after the verdict or de- "cision was rendered, unless unavoidably pre- "vented."

Compiled Statutes of Nebraska, 1897, sec. 5089.

Whether or not this state statute comes within the meaning of section 914 of the Revised Statutes of the United States, it is not necessary here to consider. It is sufficient, I think, that it has been the usage and practice of the bar of the Federal Courts for the District of Nebraska to file a motion for a new trial, as was done in this case, within three days after the entry of the judgment. This is at least after the analogy of the state practice. The courts for this district have always, without exception, recognized this as proper practice, have uniformly entertained and acted upon such motions, sometimes sustaining and sometimes overruling them; and in such cases the usage and practice of the particular court is entitled to be considered.

Shoby vs. Foot, 20 How., 290-295.

(c) There never have been any written rules promulgated by the United States Circuit Court for the District of Nebraska. The filing of a motion for a new trial as was done in this case was one of the unwritten rules of the court, recognized both by the bench and bar as an established form

of procedure of the court. And I submit such a rule is valid, under the authority of section 918 of the Revised Statutes giving the Circuit Courts power to make rules and orders regulating their own practice.

The rules of the Circuit Court for the southern district of New York, and for the northern district of Vermont, and for the District of Columbia, relating to motions for new trials, have never been questioned, and yet they are each quite as much outside the letter of a federal statute as the rule prevailing in the Circuit Court for the District of Nebraska, allowing, pursuant to, or after the analogy of the state practice, such a motion to be filed at any time within three days after the entry of the judgment.

Blatchford, Rules and P... tistics of Uni... States Cou... 406, 652, 654, 5...

(*d*) Motion for a new trial is spoken of and recognized as a customary, proper, and established form of procedure of this court.

Marine Ins. Co. v. Young, 5 Cranch, 186, (1809).

Henderson v. Moore, 5 Cranch, 11, (1809).

Blunt v. Smith, 7 Wheat., 248, (1822).

Lanahan v. Ins. Co., 1 Pet., 170, (1828).

United States v. Buford, 3 Pet., 12. (1830).

New York Life Ins. Co. v. Wilson, 8 Pet., 291, (1834).

Boswell v. De Le Lanza, 20 How., 29, (1857).

Warner v. Morton, 20 How., 448, (1857).

Insurance Co. v. Barton, 13 Wall., 603 (1871).

Railway Co. v. Heck, U. S., 120, (1880).

(e) Motion for a new trial is the only remedy in certain cases.

Mulhall v. Keenan, 18 Wall., 342.

Babcock v. City 3 Wall., 240.

(f) Remedy by motion for new trial is a common law remedy, existing probably independent of statute, and is an incident to the general powers of the court. It is a convenient and useful general remedy guaranteed by Section 726 above quoted. Its convenience and general usefulness as a form of relief are not intended to be impaired or curtailed by Section 987 of the Revised Statutes. That section is supplementary to the usual remedy by motion, and enlarges the rights of the defeated party when he invokes the privileges by it conferred. Perhaps it will be convenient if I quote the section:

vs. Evi-
18 Fed.,

"Section 987. When a Circuit Court enters "judgments in a civil action, either upon a verdict "or on a finding of the court upon the facts, in "cases where such finding is allowed, execution "may on motion of either party, at the discretion "of the court, and on such conditions for the se-"curity of the adverse party as it may judge proper, "be stayed 42 days from the time of entering "judgment, to give time to file in the clerk's office "of said court a petition for a new trial. If such "petition is filed within said term of 42 days, with a "certificate thereon of any judge of said court, that "he allows it to be filed, which certificate he may "make or refuse at his discretion, execution shall "as of course be further stayed to the next session

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'of said court. If a new trial be granted, the "former judgment shall thereby be rendered void."

The objects and effect of this section are threefold: (1.) To confer upon the Courts the power to extend the time for the preparation for the application for a new trial; (2.) To carry the case over, if need be, into the succeeding term, and thus to allow the defeated party to file his petition for a new trial at the term after the one at which the judgment was entered, if the judgment was entered so near the end of the trial term that the motion for a new trial could not properly be prepared and filed before the term ended; (3.) To stay execution until the question as to whether or not the judgment ought to stand can be determined.

The foregoing was evidently MR. CIRCUIT JUDGE MCCRARY'S view, for in speaking of the effect of said section 987, MR. CIRCUIT JUDGE MCCRARY, said:

Rutherford v. Penn. Mutual Life Ins. Co., Fed. Rep., 455.

"Now, this is not the only section under which "the party can apply for a new trial. His right to "apply is independent of this section. This pro- "vides for a case where he desires to obtain from "the Court an extension of the usual time within "which to make his application for a new trial; and "in that case, where he gets such time merely to "apply, he must show that he has presented his "petition, and that it has been allowed in accord- "ance with the provisions of the section; but if he "makes his motion for a new trial, without asking "for time, then he can make it independent of sec- "tion 987, and is not bound by the provisions of

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"that section. In other words the court had a per-
"fect right to entertain the motion for a new trial,
"it did entertain it, and suspended the execution
"until it should be determined."

vs. Spiro, d. 576.

MR. CIRCUIT JUDGE TAFT, in a late case (February, 1897), refers to the filing of a motion for a new trial, not as a matter of leave, but as a matter of right, under section 726 of the Revised Statutes, and says that section 987 "relates only to the "method of staying execution pending new trial, "and does not limit the time in which motions for "new trials may be otherwise filed."

Section 987 and the section following it, are the only provisions in the federal statutes for the stay of execution. One provides for a stay when it is doubtful whether or not the judgment ought to stand; the other provides for a stay when the state laws in the state where the court is held does the like.

Second Point.

The motion in this case, although called a motion, possesses all the requisites of a petition, and is substantially a petition.

r vs. Jones, et. (Mass.).

Besides, if the pleading was defective in form, the defect was waived by going to hearing on it. The court regards the substance of the thing, and not the form. MR. CIRCUIT JUDGE PUTMAN lately said: "The motion filed May 6th, 1893, and heard "after the entry of the decree of May 13th, 1893, "must be regarded as in effect the same as a peti-"tion for a rehearing, filed after judgment under "rule 29. It was heard on its merits without ob-

e Ws vs. n, 61 Fed. 149.

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'jection, and can have no other possible effect. It "was entirely lacking in form, but in the Federal "Courts when substance is preserved, defect of "form is easily waived as was done in this case."

Third Point.

Leave to file a motion for a new trial is not required. It may be filed pursuant to the general statute and practice of the courts, unless there is a rule to the contrary. If leave to file, however, were necessary, it will be presumed in this case that leave was granted.

The motion was entertained by the court. The parties treated it as properly filed. The recital of the record is that "it was argued, and submitted to the court by the attorneys for the respective parties." Page 29.

It would be a fair test of the effect of the failure of the record affirmatively to show that the motion was filed with leave, to consider that as the only question in the case. Assume that the statute provided that the judgment should not be deemed final until the overruling of the motion for a new trial that was filed with leave of court, and the record came up not showing leave to file the motion, but showing that the motion was seasonably filed, was argued and submitted to the court by the attorneys for the respective parties, and was carefully considered by the court. What would your Honors say in response to a motion to dismiss the writ because the record did not show that the motion was filed with leave? Similar cases have often occurred, and have always been controlled

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by the general maxim, *omnia praesumuntur rite esse acta.*

Fourth Point.

The recitals of this record show that this motion and the consideration of it by the court were in all things regular.

The recitals of the order overruling the motion are that "this cause having been heard on the "motion of defendant to set aside the judgment and "the verdict and for a new trial herein, was argued, "and submitted to the court, by the attorneys for "the respective parties, whereupon, after careful "consideration thereof, and being fully advised in "the premises it is now on this day considered" &c.

29.

If it were necessary in order to give effectiveness to a motion for a new trial to show that it was entertained by the court in the first instance, or if it were necessary that such a motion should be argued and submitted during the trial term, the court here would presume from the foregoing recital in the order overruling the motion that all necessary steps to give validity and effectiveness to the motion had been taken; that the procedure was in all respects regular, the record nowhere showing the contrary.

U. S. 31.

In *Aspen Mining & Milling Co. v. Billings* it was urged that the appeal was taken too late, because it did not affirmatively appear that the petition for rehearing was filed during the term at which the decree was entered, or was entertained by the court. But in answer to that contention Mr. Chief Justice Fuller giving the opinion of

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this court, said: "But it is said this cannot be the "result under either statute or rule, of the mere "filing of a motion or petition for rehearing, and 'that it does not affirmatively appear in this case "that the motion or petition was entertained by the "court. But we should be inclined to hold, if a "decision in that regard were called for, that since "the application was passed upon as having been "duly made, the presumption must be indulged "that it was entertained by the court in the first "instance, and during the term at which the decree "was pronounced."

Fifth Point.

Taking this record, therefore, as it is, with the presumptions created by its recitals and that otherwise obtain with relation to the regularity of the proceedings of the court, it must be concluded,—the record itself affirmatively shows the fact to be,—that this motion was duly made and presented in season, and was entertained by the court. Therefore the time limited for a writ of error did not begin to run until the 11th day of December, 1895, the day on which the motion for a new trial was disposed of. Until then the judgment did not take final effect for the purposes of the writ of error in this case. Hence, the plaintiff in error was in time when it sued out its writ of error on the 20th day of January, 1896, less than two months after the judgment in the suit became final by the overruling of the motion for a new trial. Such seems to be the established construction by this court of this and like statutes.

Your Honors in the late case of *Aspen Mining*

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U. S. 31.

Milling Company v. Billings, fully considered this question. In that case the decree was entered October 20th, 1890, one of the days of the May Term, 1890, of the Circuit Court for the District of Colorado. A motion for a rehearing was filed October 25th, 1890. The November term commenced November 4th, 1890, and adjourned March 20th, 1891. "On April 26th, 1891, the complainants "filed in the case a request for decision on the mo- "tion for rehearing, which recited that the motion "had been submitted in open court at the beginning "or very early in the last term. The May Term, "1891, opened on the first Tuesday, being the 5th "day of May, 1891, and on that day the record re- "cited that 'the motion for a rehearing of this cause "having heretofore come on to be heard, and hav- "ing been submitted on proofs, the court being suf- "ficiently advised, denied the motion.'" On July 2nd, 1891, one of the days of the May term, 1891, of the court, complainants prayed an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, which was allowed. The citation was issued August 15th, 1891, and duly served.

Such being the dates and facts of the case, what did your Honors say about it? Inasmuch as I deem that decision of great importance in the present controversy, I beg to quote in full the decision of the court, by MR CHIEF JUSTICE FULLER, on this point, omitting only the last paragraph thereof, which is quoted at the end of the last above paragraph of this brief, to-wit:

"The decree dismissing complainant's bill was "entered on October 20th, 1890, but an applica- "tion for a rehearing was made shortly thereafter,

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"and during the same term, but not disposed of
'until May 5th, 1891.

"*The rule is, that if a motion or a petition for*
"*rehearing is made or presented in season and enter-*
"*tained by the court, the time limited for a writ of*
"*error or appeal does not begin to run until the motion*
"*or petition is disposed of. Until then the judgment*
"*or decree does not take final effect for the purpose of*
"*the writ of appeal. Brockett v. Brockett*, 2 How.,
"238, 249; *Texas & Pacific Railway v. Murphy*, 111
"U. S., 488; *Memphis v. Brown*, 94 U. S., 715.

"If this case falls within that category, then
"the six months within which the appeal had to be
"taken under Section 11 of the Judiciary Act of
"March 3rd, 1891, did not commence to run until
"May 5th, 1891, and the appeal was in time.

"It is true that equity rule 88 provides that no
"rehearing shall be granted after the term at which
"the final decree of the court shall have been
"entered and recorded if an appeal lies to the Su-
"preme Court; but if this petition for rehearing
"was filed in season and entertained by the court,
"then the decree, although entered in form, did not
"discharge the parties from their attendance in
"the cause, and they were bound to follow the pe-
"tition thus pending to the next term. The suit
"was thereby prolonged until the application was
"disposed of in the regular course of proceedings.
"This is expressly so ruled in *Goddard v. Ordway*,
"*supra*.

"In *Giant Powder Co. v. California Vigorit*
"*Powder Co.*, 5 Fed. Rep., 197, S. C. 6 Sawyer, 508,
"it was said by MR. JUSTICE FIELD that equity rule

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'88 applies only where no petition is presented "during the term, and the numerous cases in which 'it has been held that the time limited for an ap- "peal does not begin to run until a petition for a "rehearing properly presented has been disposed "of, sustain that view. The decree does not, in "legal effect, remain final while the petition is pend- "ing, and the prescription of rule 88 must be con- "strued to mean that a rehearing cannot be granted "after the lapse of the term, unless application is "made therefor during the term, and being duly "entertained, the decree is hereby prevented from "passing beyond the control of the court. *The en- "tertaining of the petition keeps the jurisdiction alive.* "and the granting of the rehearing may be made "absolute or denied thereafter, as the court may "determine."

When this subject next came up for consider- ation, your Honors held that the appeal could not be taken from the decree while the motion for a rehearing was pending, and that "the taking of a "new appeal becomes necessary upon the denying "of the rehearing."

hees vs. nufacturing 151 U. S., 135.

Still later, your Honors again held that when a motion for rehearing "is made or presented in "season, and entertained by the court, the time "limited for a writ of error or appeal does not be- "gin to run until the motion or petition is disposed "of. Until then the judgment or decree does not "take final effect for the purpose of the writ of "error or appeal."

bern Pacific Road Co. vs. nes, 155 U. 37.

The rule your Honors have thus so specifically stated and reiterated gives expression, and is re-

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sponsive, to the decisions and practice and procedure of this court from a very early date.

In *Brockett v. Brockett*, a final decree was entered on the 10th of May. On the 26th of the same month a petition was filed to have the final decree opened for certain purpose. The court took cognizance of the proceedings, and referred them to a master commissioner. The commissioner filed his report on the 9th of June, but the court then refused to open the decree. Under the statute in force at that time an appeal might operate as a supersedeas if taken and the appeal bond filed within ten days, Sundays excepted, after the entry of the final decree. On the question therefore, as to whether or not the ten days commenced to run after the overruling of the petition on June 9th to open up the decree for certain purposes, MR. JUSTICE STORY said: "Now the argument is, that as "the original degree was rendered more than one "month before the appeal, it could not operate, "under the laws of the United States as a *supersedeas*, or to stay execution on the decree, and be- "cause to have such an effect the appeal should be "made, and the bond should be given within ten "days after the final decree. But the short and "conclusive answer to this objection is, that the "final decree of the 10th of May was suspended by "the subsequent action of the court, and it did not "take effect until the 9th of June, and that the ap- "peal was duly taken, and the appeal bond given, "within ten days from this last period." 2 How., 258 (1844).

In the *Slaughter House Cases*, MR. JUSTICE CLIFFORD said: "Filed as the writs of error were with- 10 Wall., 273.

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"in ten days from the date of the entry refusing "the petition for rehearing, it is claimed by the "plaintiffs that the several writs of error operate as "a *supersedeas*, and stay execution under the 23rd "section of the Judiciary Act. Doubts were at one "time entertained upon that subject, but since the "decision in the case of Brockett v. Brockett, the "question must be considered as settled in accord- "ance with the views of the plaintiffs."

U. S., 715. In *Memphis v. Brown*, MR. CHIEF JUSTICE WAITE said: "Under the ruling in Brockett v. "Brockett, 2 How., 241, the motion made during the "term, to set aside the judgment of March 2nd, "suspended the operation of that judgment, so that "it did not take effect for the purposes of a writ of "error until May 20th, when the motion was dis- "posed of."

U. S., 745. In *Goddard v. Ordway*, a motion was made and entered on the minutes to vacate the affirmance of the decree, and grant a reargument. Nothing further was done at that term of court. It was held that the motion prolonged the suit, and the parties thereto were in court until it should be finally disposed of. The Court there said: "A "paper may be filed in the proper office, and yet "not brought to the attention of the court while "sitting in judgment, but when what it calls for "appears on the minutes of the actual proceedings, "it must be presumed that the court, in some form, "gave it judicial attention, and that it was pre- "sented in some regular way. In the Supreme "Court of the District as we are advised if any "matter in hand is not disposed of at one term, it "is deemed to have been continued to the next.

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"Whatever parties are bound to take notice of one "term, they must follow to the next, if they are not, "in some appropriate form dismissed from further "attendance. In this case, the motion for reargu- "ment went over as unfinished business, and carried "the parties with it. The proceeding was, in all "material respects, like a motion for a new trial, "filed in time at one term, and not disposed of "until the next. Under such circumstances, a "judgment or decree, although entered in form "does not discharge the parties from their attend- "ance on the cause. They must remain until all "questions as to finality of what has been done are "settled. The motion, when entertained, prolongs "the suit, and keeps the parties in court until it is "passed upon, and disposed of, in the regular "course of proceeding."

In *Texas & Pacific Railroad Co. v. Murphy*, the judgment was entered May 29th, 1883. A motion for a rehearing was made, and was decided December 21st, 1883. The question was, within what time did the sixty days, within which to sue out and serve the writ of error, for the purpose of a *supersedeas*, commence to run? It was held that the time limited for the writ of error did not begin to run until the motion for a rehearing was disposed of, and that the sixty days commenced to run after the latter date, the Court saying: "It was "expressly ruled in Brockett v. Brockett, which has "been followed in many cases since, that if the peti- "tion for rehearing is presented in season, and en- "tertained by the court, the time limited for an ap- "peal or writ of error does not begin to run until "the petition is disposed of. Slaughter House

111 U. S. 488.

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"Cases, 10 Wall., 273, 289; Memphis v. Brown, 94 "U. S., 715, 717. The motion for a rehearing in "this case was not decided until December 21st, "and the writ of error was sued out, and served, "within sixty days thereafter. This was in time to "secure the supersedeas."

This long, uniform holding of this court is certainly high authority for the proposition I am here urging, unless the effect of a motion for a rehearing in a suit in equity can in some way be distinguished from the effect thereof in an action at law. But the practice act provides, section 1012, that appeals from the circuit courts shall be subject to the same rules, regulations, and restrictions as are, or may be prescribed in cases of writs of error. Appeals and writs of error could not be subject to the same rules, regulations and restrictions, if the time for taking an appeal were six months after the overruling of a motion for a rehearing in an equity suit, and not within six months after the overruling of a motion for a new trial in an action at law.

In Section 11, relating to the time for taking appeals and writs of error, of the act creating the United States Circuit Courts of Appeals, appeals and writs of error are put in the same category.

In speaking of the effect of a motion for a rehearing on the time for taking an appeal or writ of error, your Honors have always referred to appeals and writs of error in the same language, and as similiarly affected by a petition for rehearing or a motion for new trial.

Some of the United States Circuit Courts of Appeals, applying the rule on this subject that this

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court has so well established, have retained jurisdiction where the writ of error or appeal was filed within six months from the overruling of the motion or petition for a new trial, although filed more than six months from the date of the entry of the judgment.

In the Fifth Circuit in a late case going up on error to the Circuit Court for the Southern District of Florida, "the judgment in the court below was rendered on the 1st day of May," which was the February, 1895, term of said court; and thereupon a motion for a new trial was entered, which was overruled at the May, 1895, term of said court, on the 2nd of June of said term.

Louisville Trust Company v. Stockston, Fed. 1.

"The citation directing the defendant in error "to answer in this court was signed and issued on "the 9th day of November, 1895, more than six "months after the entry of the judgment sought to "be reviewed, but within six months from the date "when the motion for a new trial was overruled." A motion was made to dismiss the writ of error because it had not been sued out until more than six months after the entry of the judgment. But the motion was overruled, because "the time limited "for suing out a writ of error does not begin to run "while there is a motion for a new trial pending."

In the First Circuit, in a late case, the appellee's motion to dismiss the appeal because the appeal was not taken within six months from the entry of the judgment was overruled, upon the ground that the "decree was suspended by a mo- "tion for rehearing, and did not take effect and be- "come operative until the motion was overruled."

Andrews v. Thum, 72 Fed. 290.

EDGE

CONCLUSION.

From the facts in this record therefore it must be concluded that the filing of the motion for a new trial as was done in this case was proper procedure; that the name given the paper filed cannot impair its effectiveness if it was sufficient in substance to form the basis of an order granting a new trial; that upon this record it must be presumed that leave to file the motion was granted, if such leave were necessary, and that the motion and the court's consideration of it were in all things regular; that the motion having been seasonably made, and entertained by the court, prolonged the suit until the motion "was disposed of in the regular "course of proceedings," and that until then the judgment did not take final effect for the purposes of the writ of error.

If this conclusion is correct, then it follows that the writ of error was sued out in time; that the Court of Appeals had jurisdiction; and that the order dismissing the writ of error was erroneous.

Respectfully submitted,

JAMES H. McINTOSH,

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Omaha, 9 September, 1897.